STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

In the matter of Unit Clarification Petition No. 1-81

Between American Federation of State County and Municipal Employees, AFL-CIO)
and)
The City of Whitefish, Montana)

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FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

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The American Federation of State, County and Municipal Employees, (Union, AFSCME) filed a unit clarification petition requesting an order clarifying the city of Whitefish's water, sewer, streets and alley bargaining unit to include the water clerk and the water clerk-meter reader position in the bargaining unit. Because the Board of Personnel Appeals has little precedence in some areas, I will cite federal statute and case law for guidance in the application of Montana's Collective Bargaining Act, Title 39, Chapter 31 MCA. The federal statute will generally be the National Labor Relations Act, 29 USCA Section 151-166 (NLRA). The Montana Supreme Court, when called upon to interpret the Montana Collective Bargaining for Public Employees Act, has consistently turned to the National Labor Relations Board (NLRB) precedent for guidance. (State Department of Highways vs. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785, 1974; ASFCME 2390 vs. City of Billings, 55 P.2d 507, 93 LRRM 2753, 1976; State of Montana ex. rel. Board of Personnel Appeals vs. District Court of the 11th Judicial District, 598 P.2d 1117, 36 State Reporter 1531, 1979; Teamsters Local 45 vs. Board of Personnel Appeals

and Stuart McCarvel, 635 P2d 1310, 38 State Reporter 1841, 1981).

At the hearing held September 18, 1981, the party stipulated that there is no disagreement concerning the application of Rule 24.26.630 (1)(b),(c), and (d) ARM or Section 39-31-103(4)(12) MCA; that there is a disagreement concerning the application of Rule 24.26.630 (1)(a) and Rule 24.26.611 ARM; and that the Board of Personnel Appeals has jurisdiction of the petition. During the hearing and by briefs the parties raised the additional question of should the Board of Personnel Appeals substitute its judgment for the judgment of the parties concerning a recognition clause, can the employer and the union reach an agreement in negotiations on a recognition clause which would usurp a right given an employee through Montana's Public Employees Collective Bargaining Law, and can the City make changes in the water department by subcontracting out the meter reading duties?

I. FINDINGS OF FACT

After a thorough review of the testimony, exhibits and post hearing briefs, I make the following findings of fact:

1. In a brief, the Union sets forth the following history of the bargaining unit. On June 17, 1976, the Board of Personnel Appeals conducted an election for the bargaining unit. On June 24, 1976, Robert R. Jensen sent a letter to the Mayor of Whitefish stating "the Board of Personnel Appeals hereby certifies the American Federation of State, County and Municipal Employees as the exclusive representative for collective bargaining purposes for employees of the water, sewer, street and alley department of the City of Whitefish." Through the negotiation process a recognition clause was adopted between the parties which excluded the

clerk of the water department.

2. The 1980-81 collective bargaining agreement between the parties contains the following pertinent articles:

> Article No. 1 - Recognition - The employer recognized the Union as the bargaining agent for all employees of the city's sanitation, sewer, street and water departments, excepting and excluding: clerk of the water department, supervisors as defined by the Act, and all other employees.

The collective bargaining agreement also contains Article XVI, Grievance and Arbitration provision which defines a grievance as an alleged violation or misapplication of a specific provision of this negotiated agreement. The Article culminates in binding arbitration. The collective bargaining agreement also contains Article XIX, a contracting out provision, plus a wage addendum listing wages for meter readers. The record contains information about the existence of a new collective bargaining agreement between the parties, but the record contains no information about any changes in the above Articles. (Joint Exhibit I).

3. Caroline Wehr is a clerk in the water department who first started working for the City of Whitefish about February, 1981. Caroline Wehr's testimony contains no information about any changes in the job duties or job relationships.

4. Carolyn Zwisler is a clerk-meter reader in the water department who first started working for the City of Whitefish about May, 1981.

On August, 31, 1981, Carolyn Zwisler and the City of Whitefish entered into a contractor's agreement for Carolyn Zwisler to read water meters for the City. The contractor's agreement starts October 1, 1981, and ends September 30, 1982. The City of Whitefish agreed to pay the contractor $310 per month for basic services of reading water meters.

(Management Exhibit A). The record contains no other evidence of changes in the clerk-meter reader position.

5. The city engineer, public works director, Paul Wells currently supervises the position of water clerk and water clerk-meter reader. Mr. Wells outlines a plan to subcontract the meter reading job, to hire a part-time temporary water clerk from September 28, 1981, to December 31, 1981, (Management Exhibit B), to replace the old Burrough's L6000 accounting machine with a new computerized accounting machine, and to eliminate the part-time temporary water clerk position after the new computerized accounting machine becomes fully operational about December 1, 1981.

6. The City Manager since July 1981, Mr. Don Morrison testified at length about future changes in the form and structure of the city government required by the new City Charter and testified at length about the future plans for reorganizing the city departments, employee's supervision and employee's job duties. All future plans and changes are subject to the approval and/or disapproval of the Whitefish city council.

Mr. Morrison also states that there are a few employees in the city treasurer's office and other city offices which could be part of a city clerical bargaining unit along with the positions in question.

II. DISCUSSION

The first question is, can the parties negotiate a recognition clause?

In unfair labor practice case Helena Firefighters, (ULP #19-78), the Board of Personnel Appeals relied on the teachings of Borg Warner, Wooster Division 356 US 342, 42 LRRM 2034, 1958, and found a recognition clause to be a permissive subject of bargaining which could not be taken to

impasse. The teachings of Borg Warner, supra, are in full compliance with Hess Oil and Chemical Corp. vs.NLRB, 415 F.2d 440, 72 LRRM 2123, CA5-1969, which the Union cites as controlling. In Hess Oil, supra, the NLRB found a bargaining lock-out to be lawful and not a violation of NLRA Section 8(a)(3) not withstanding that the employer violated the NLRA Section 8(a)(5) by insisting that certain employees be excluded from the bargaining unit. The NLRB continues to hold that it is a violation of the NLRA Section 8(a)(5) to insist to impasse that certain classifications be removed from a certified and/or contractually established bargaining unit. (See National Fresh Fruit and Vegetable Company vs. NLRB, 565 F.2d 1331, 97 LLRM 2427, CA5-1978, enforcement denied because of no impasse).

In the second part of the question, the Union has argued the parties have no business modifying a Board of Personnel Appeals Unit decision. In Douds vs. International Longshoremen's Association 241 F.2d 278, 39 LRRM 2388, 1957, the Second Circuit Court of Appeals stated that a unit decision of the NLRB ". . . may be altered by agreement of the parties, if the process of alteration involves no disruption of the bargaining process or obstruction on commerce and if the Board does not disturb the agreement in a subsequent representation proceeding." (39 LRRM at 2391). I can see this Board should follow the above teachings.

In the third part of the question, the union has argued the parties have no business compromising any employee's representation rights. By bargaining the water clerk and the water clerk-meter reader out of the bargaining unit, the Union argues the parties are effectively denying the employees the right to join, form, and assist a labor organization as set forth in Section 39-31-201 MCA. I disagree because the

rights set forth in Section 39-31-201 MCA are employee's rights, not union rights. That is, if one union agrees with the employer not to represent a group of employees, the employees are still free to be represented by all other unions or form their own independent union. In this case, employees in question could join the clerical employees from other city departments and form a clerical unit. The only thing that has been waived is AFSCME's opportunity to represent those employees. (See Valley Mould & Iron Corp. vs. NLRB, 116 F.2d 760, 7 LRRM 524, CA7-1940, where the court said Section 7 of NLRA was intended to secure and preserve the employees the right to bargain collectively without intimidation, coercion or other improper influence from anybody, whether it be employer, labor union or other).

Therefore, in this case, because the two employees in question are not the only employees eligible to join a labor organization excluded from the collective bargaining unit and because of the teachings of Borg Warner, supra, National Fresh Fruit, supra, and Douds, supra, the parties can negotiate and modify a recognition clause for collective bargaining purposes short of impasse.

The second question is, should the Board of Personnel Appeals substitute its judgment for the parties concerning a recognition clause?

In Mungehelia Power Company, 198 NLRB No. 177, 81 LRRM 1084, 1972, the NLRB set forth the following:

> "Here, as in Wallace-Murray [192 NLRB No. 160, 78 LRRM 1046, 1971] relied on by the Employer, the unit placement of the individuals involved was made clear in the unit description contained in the current agreement, and their status has not changed since its execution. In these circumstances, to permit one of the contracting parties to effect a change in the definition of the unit by means of a clarification procedure would, as we said in Wallace-Murray, be disruptive of an established bargaining relationship. Moreover, there is another fundamental basis for denying

> the requested clarification. Where, as here, the jobs of the involved individuals have been in existence for a number of years and no recent changes have occurred to warrant finding the individuals to be accretions to an existing unit, the Board has held that a request to add them to the unit raises a question concerning representation and may not be resolved in a unit clarification proceeding.
>
> Accordingly, we shall grant the Employer's motion to dismiss the petition.

Using the above teachings for guidance, I find that the agreement between the parties contains a clear recognition clause and that the job duties and job relationships have not changed. Therefore, I recommend that the Board of Personnel Appeals not proceed in this matter because there is no change in the job duties and the job relationships. Also, the dismissal of the union unit clarification petition would not be disruptive to the established collective bargaining relationship and would foster the policy of Montana's Collective Bargaining for Public Employees Act under Section 39-31-101 MCA. The Board of Personnel Appeals should be free in other cases to clarify a bargained recognition clause if the petitioner can demonstrate a change in the job duties and job relationship and/or recognition clause is not clear.

The third question is the subcontracting of the meter reading duties.

This is a question of contract application and interpretation of Article XIX. The contract contains an internal method of resolving any contract dispute - the grievance and arbitration procedure, Article XVI. Therefore, I believe I should not address any question considering the correctness of the subcontracting even if by the largest stretch of the mind it could be read into this unit clarification petition. In this case, a complaint of subcontracting cannot be read into the petition. (See Billings School District No. 2 vs. Board of Personnel Appeals 36 State Reporter 2311, 103 LRRM 2285, 1979).

The fourth question is the application of Rule 24.26.630 (1)(a) ARM which states "there is no question concerning representation."

The NLRB will dismiss a unit clarification petition if it raises an issue that can only be resolved by an election. (See American Broadcasting Company, 36 LRRM 1063, 1955; General Motors Corp. 39 LRRM 1316, 1957).

For resolution, the union suggests that the Board of Personnel Appeals dismiss the employer's claim and that the Board of Personnel Appeals order an election. The remedies requested by the union are contrary to the NLRB guidelines and raises a question of representation under Rule 24.26.630 (1)(a) ARM.

III. CONCLUSIONS OF LAW

Because the unit clarification petition raises a question of representation and violates Rule 24.26.630 (1)(a) ARM and because the unit clarification petition does not foster the policy of Montana's Collective Bargaining for Public Employees Act, Section 39-31-101 MCA, a conclusion of law dismissing the unit clarification petition is in order.

IV. RECOMMENDED ORDER

For reasons set forth above, I recommend that unit clarification petition No. 1-81 between the American Federation of State, County and Municipal Employees and the City of Whitefish, Montana be dismissed.

Dated this 8th day of July, 1982.

BOARD OF PERSONNEL APPEALS

Rick D'Hooge, Hearings Examiner

NOTE: As set forth in the Board of Personnel Appeals rules, the parties shall have twenty (20) calendar days to file written exceptions to this recommended order. If no exceptions are filed, this recommended order becomes the full and final order of the Board of Personnel Appeals.

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 8th day of July, 1982:

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& Municipal Employees, AFL-CIO
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PAD2:J

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